No. 52. Q.

Add'l Brf. of Atty Gen'l Richards for Appellant.

Filed April 21, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE OREGON AND CALIFORNIA RAILROAD Company et al., appellees. } No. 52.

ADDITIONAL POINTS FOR THE UNITED STATES IN REPLY.

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ADDITIONAL POINTS FOR THE UNITED STATES IN REPLY.

The additional brief for appellees was not read until after the argument. The following suggestions are in reply to it:

I.

The lands both within the granted and indemnity limits were patented to the Oregon and California, because at that time the rule in the Land Department was that priority of location determined priority of right, without regard to the dates of the granting acts. (See memorandum, with letter to register and receiver at Roseburg, Oreg., printed in the appendix.)

II.

I submit a memorandum prepared by the Land Department on the rights of *bona fide* purchasers under recent legislation, showing that a decree of reversal in this case may be so framed as amply to protect the rights of any *bona fide* purchasers from the Oregon and California.

III.

The suggestion that a railroad from Wallula to Portland might be constructed through mountain passes so as to reach Vancouver and Portland while running in a southerly direction, thus making the terminal line at Portland an east and west line, does not help the Oregon and California, because:

1. A line built from Wallula to Vancouver through the Cascade Mountains would not be a line "via the valley of the Columbia River." The Pennsylvania Railroad from Pittsburg to Cincinnati is not a line "via the valley of the Ohio River," although it keeps within the northern watershed of the Ohio River. It crosses the waters of the Muskingum, the Scioto, the Miami, and other tributaries of the Ohio, but it does not run down the Ohio Valley; on the contrary, at Columbus it is over a hundred miles from the Ohio Valley.

2. Even if such a line could be built in compliance with the limitation of the act of 1864, its terminal line at Portland would not be an east and west line. A railroad company can not, by the use of curves and crooks at the end of its railroad, fix the direction of its termi-

nal line to suit itself without regard to the direction of the entire road. I print in the Appendix a memorandum upon this point, with special reference to the cases cited by opposing counsel.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 17, 1899.

APPENDIX.

INDEMNITY LANDS OF THE OREGON AND CALIFORNIA WITHIN THE OVERLAP.

It might be interesting to the court to know how these lands within the secondary or indemnity belt of the Oregon and California grant and also within the overlap of the Northern Pacific grant via the valley of the Columbia River to a point at or near Portland came to be patented on account of the first-mentioned grant.

The reason is plain when one has a knowledge of the rulings of the Land Department in the matter of the determination of rights under railroad land grants in force at the time of the patenting of these lands. Relative to the respective rights of grantee claimants to the lands within the overlap of their grants, it was the rule of construction prevailing in the Land Department at the time of the issue of these patents that priority of location determined priority of right, without regard to the dates of the acts making the grants. (See following letter to register and receiver at Roseburg, Oreg., relative to a conflict between the Oregon and California Railroad and a prior grant for the Coos Bay wagon road.) This rule prevailed until the decision of this court in the case of the *M., K. and T. R. R.* v. *K. P. R. R.*, 97 U. S., 491.

It was also held that the rights of the grantee claimant under a railroad land grant attached within the indemnity limits at the same time that its rights became

fixed within the primary or granted limits, and that selection was not necessary in order to attach a right to the lands within the secondary or indemnity belt. (*Swift* v. *California and Oregon*, 2 Copp's L. L., 733.) This rule prevailed until the decision of this court in the case of *Ryan* v. *Central Pacific* (99 U. S., 382, 386). See *Blodgett* v. *California and Oregon* (2 Copp's Land Laws, 814).

Thus, as the Oregon and California Railroad Company was first in filing its map of definite location, administering its grant under the rules above given, the lands within both the primary and secondary or indemnity belt were patented on account of its grant, notwithstanding the fact that they had previously to the patenting of the lands fallen within the reserve made on account of the prior grant for that portion of the Northern Pacific road via the valley of the Columbia River to a point at or near Portland.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington D. C., January 8, 1874.

REGISTER AND RECEIVER,
Roseburg, Oreg.

GENTLEMEN: I am in receipt of your letter of 13th June last, transmitting an appeal from your decision refusing to approve list No. 2, of selections within 3 miles limits of the Coos Bay Wagon Road Company.

You refused to approve the selections because within the limits of the grant to the Oregon and California Railroad Company, holding that the railroad company was entitled to the lands by reason of the priority of their granting act.

I have to state that in accordance with existing rulings of the Department the date of the act does not govern in

cases of this kind, unless authority is found in the granting act to so rule.

It is the date of definite location of the railroad which decides the priority of right.

The lands in controversy lie in townships 27 south, ranges 6 and 7 west, and townships 28 south, ranges 7 and 8 west, aggregating 7,423.52 acres.

The files and records of this office show that the definite location of the Oregon and California Railroad Company to the south line of township 27 south was adopted by the board of directors March 8, 1870, and to the south line of township 30 south, December 10, 1870, and in accordance with present rulings of the Department these dates are taken to be the definite location of the road. The definite location of the Coos Bay wagon-road upon the earth's surface was between September 1 and October 26, 1869, which was prior to the bestowal of the grant by the State.

The State legislature of Oregon, by act of October 22, 1870, designated this company as the beneficiary of the Congressional grant, which, in my opinion, in the absence of proof of any earlier authorized adoption of the line, should be taken as the date when the right of the company attached.

Therefore the Oregon and California Railroad being definitely located to the south line of township 27 south March 8, 1870, the company are entitled to the conflicting lands north of that line, and the right of the Coos Bay Wagon Road Company having attached prior to the definite location of the railroad south of that line, said wagon road company are entitled to the conflicting lands south of the point, and I so hold.

You will notify the officers of both companies of this ruling and allow the usual sixty days for appeal.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

BONA FIDE PURCHASER.

The bill in this case was filed under the provisions of the act of March 3, 1887 (24 Stat., 556), which made due provision for the protection of the interests of *bona fide* purchasers from the company.

That act contemplated that the title erroneously given the company should first be returned to the United States, and upon proof of *bona fide* purchase from the company, provision was made in the fourth section of that act for the issue of a patent by the United States to the purchaser to relate as of the date of his purchase from the company, whereupon demand was to be made of the company for the price of the land.

The act of March 2, 1896 (29 Stat., 42), changes this practice, by providing in its second section—

"That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, *for the value of said land*, which in no case shall be more than the minimum Government price thereof, and *the title of such claimant shall stand confirmed*. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by THE COURT TO BE A BONA FIDE PURCHASER, the court shall decree A CONFIRMATION OF THE TITLE, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association

of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or, at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress."

There can be no question but that the title of all *bona fide* purchasers from the Oregon and California Railroad Company stands confirmed under the provisions of that act.

The *bona fide* character of the purchaser must, however, first be established.

In the present case two purchasers were made parties to the bill, but the other persons alleged to have purchased from the company were not made parties, so they have not shown themselves to be *bona fide* purchasers, and this court can take no notice of them. Not being parties to the suit, they will not be affected by a decree therein. Equity Rules 47, 48, and 53.

If they are *bona fide* purchasers, their rights are fully protected under the law, either through a proceeding in the Land Department or in the courts.

In this connection I desire to call the attention of the court to the fact that in the act of 1887, as well as the act of 1896, provision is made for securing to the United States the value of the lands erroneously conveyed on account of the railroad grant, even in the event that the lands erroneously certified or patented had been transferred to a *bona fide* purchaser.

As before stated, this bill was filed under the act of March 3, 1887, and had as its object the restoration of the title to the land in the United States, leaving the

Land Department to adjudicate the rights of purchasers from the railroad company.

It was not attempted, therefore, to establish the value of the lands, nor was a decree against the company for the value of the lands sought.

It is only alleged that less than one-third of the lands in suit have been sold, and a decision upon the questions involved, determining the right of the Oregon and California Railroad Company to the lands in suit under its grant, will in no wise affect the rights of those who purchased from the company in good faith.

The question as to the rights of any of these purchasers has not been passed upon by the lower court, and for the reasons before given no attention should now be given to this claim of *bona fide* purchaser made on behalf of the railroad company.

A decree of reversal could contain such direction to the court below as would amply protect the rights of any *bona fide* purchasers from the company.

TERMINAL LIMIT AT PORTLAND, OREG.

It is contended by counsel for the railroad company that it would have been possible to so locate the line of the Northern Pacific Railroad that a terminal to its grant drawn at Portland, Oreg., would not have included a single acre of the lands here in suit. We submit that no such location was possible, even waiving the question as to whether the proposed location would have been an acceptable one, not being the most direct route nor within the description of the act. It can be surely stated that upon neither of the feasible lines described by the engineer whose testimony appears in this case could a terminal have been drawn excluding the lands here in suit.

The decision of the Land Department referred to by counsel (5 L. D., 468), being the case of *Scott* v. *Kansas Pacific Railway Company*, involved only the question as to the proper establishment of the lateral limits of the grant, and not the terminal. It is true that upon the diagram illustrating said case terminal lines are shown, which lines it will be found upon examination are drawn at right angles to the last general course or direction of the road. It must be apparent that in drawing terminals to the last course or direction of the road much confusion necessarily results, for the general course or direction may be changed in the last mile or two from the terminus.

To what part of the road, then, must we be limited in fixing the terminal of the line?

In most acts provision is made for the patenting of the lands in sections of 20 or 25 miles, and for the purpose of the patenting of the lands these imaginary terminal lines drawn to these sections would necessarily be perpendicular to, or at right angles with, the road embraced in that section.

When it comes to the fixing of the final terminals at the termini of the road, it must be seen that the general course or direction of the *entire* line must control in fixing these lines.

In the case of *United States* v. *Burlington and Missouri River Railroad Company* (98 U. S., 334, 339, 340), this court, in considering the locus of the land granted, used the following language: "And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within limits perpendicular to it at each end."

It will thus be seen that the terminal lines are to be perpendicular to, not a portion of, the road, but the entire road at each end. It is maintained, therefore, that if these feasible lines referred to by the engineer be in the imagination defined upon the map and end at Vancouver, the point at or near Portland, where the map of 1865

ended, the road via the valley of the Columbia River to a point at or near Portland, the terminal line upon each of these locations, including that shown in the map of 1865 or the Perham map, would be identical. If, however, these imaginary lines be extended beyond Vancouver across the river and to the town of Portland, Oreg., a slight change would occur in the angle fixing the terminal line.

A small diagram illustrating the matter has been prepared and is hereto attached, the line A B shown thereon being the terminal heretofore established to the line via the valley of the Columbia River to a point at or near Portland, and the line C D being the terminal line which it is claimed would properly designate the terminal line to this portion of the grant if the imaginary lines be extended into the town of Portland.

THE QUADRANT CASE.

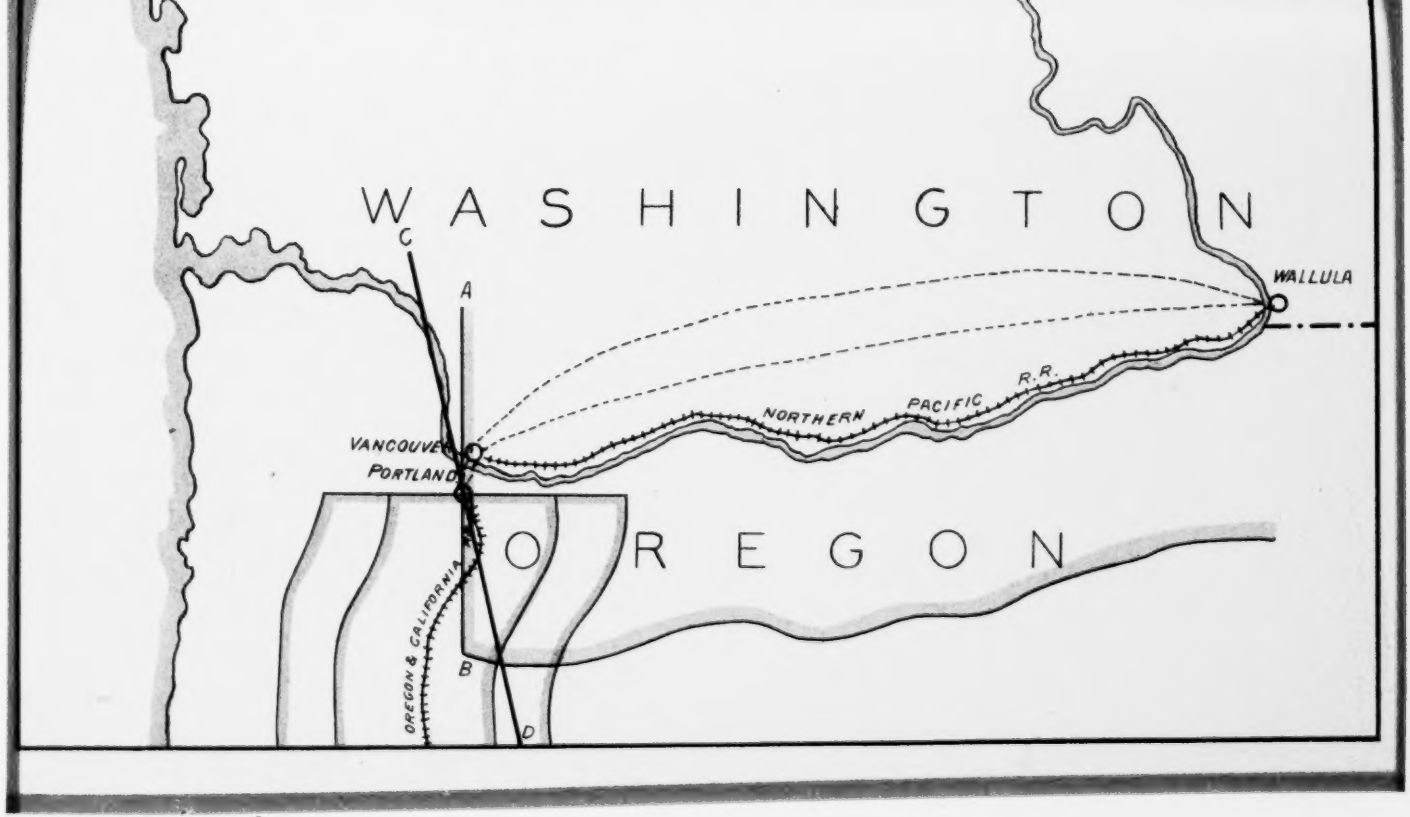
Adverting to the quadrant case which was stated by counsel to control the question as to the proper establishment of terminal lines, it will be seen from an examination of the exhibit in that case that it supports clearly the views contended for on behalf of the United States. In that case two lines of road were built:

(1) From Portland to Forest Grove.

This portion of the road, after leaving Portland, proceeds to the south about 3¼ miles, then in a northwesterly direction to Forest Grove.

Upon this road the general direction was taken to be east and west, and the terminals were drawn at right angles or perpendicular to an east-and-west line and parallel to each other.

The terminals were not established perpendicular to the last course or direction, but to the *entire* line.


WASHINGTON
OREGON
C
A
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D
WALLULA
NORTHERN PACIFIC R.R.
VANCOUVER
PORTLAND
OREGON & CALIFORNIA

(2) A road from Forest Grove to McMinnville.

This portion of the road leaves Forest Grove in a southwesterly direction, and after a few changes proceeds to McMinnville in a southeasterly direction. On this portion of the road terminals were established upon the entire line, the general course being considered as north and south, so the terminals were established perpendicular to a north and south line and parallel to one another. (See diagram in case *United States* v. *Oregon and California R. R. Co.*, 164 U. S., 526, 532.)